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09-CV-00491-CMP

AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARK HOVILA,

Plaintiff,

v.

TWEEN BRANDS, INC.,

Defendant.

No.

**C09 0491**

NOTICE OF REMOVAL OF CIVIL  
ACTION TO FEDERAL COURT

TO: The Honorable Judges of the United States District Court for the Western District of  
Washington at Seattle

Pursuant to 28 U.S.C. §§ 1331, 1332, 1441, and 1446, defendant Tween Brands, Inc.  
hereby removes the above-captioned action from the Superior Court of Washington for King  
County to this Court on the grounds of diversity of citizenship. The following statement is  
submitted in accordance with 28 U.S.C. § 1446:

**I. BACKGROUND**

1. Tween Brands, Inc. ("Tween Brands") is a Delaware corporation doing  
business in the State of Washington.

2. Plaintiff Mark Hovila ("Hovila") is a resident of the City of Lake Forest Park,  
Washington. Hovila commenced this action individually and as class representative of a class  
of similarly situated individuals against Tween Brands in the Superior Court of Washington

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124123.0001/1693737.1

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No Iss. SEA25303

1 for King County (now pending as Case No. 09-2-11996-1). Plaintiff's Complaint for  
2 Damages, Injunctive and Declaratory Relief was filed on March 11, 2009.

3 3. Plaintiff's Complaint purports to assert claims against Tween Brands for  
4 violations of 47 U.S.C. §227(b)(1)(B), RCW 80.36.400, and the Washington Consumer  
5 Protection Act ("CPA"), RCW 19.86 et seq. Plaintiff alleges that the purported class exceeds  
6 1,000. A true and correct copy of the Summons and Complaint is attached to the Declaration  
7 of Grant S. Degginger as Exhibit A.

8 4. Defendant's registered agent, CT Corporation, was served with the Summons  
9 and Complaint on March 12, 2009, and the proof of service is attached to the Degginger  
10 Declaration as Exhibit B.

## 11 II. STATUTORY REQUIREMENTS—CLASS ACTION FAIRNESS ACT

12 5. In 2005, Congress enacted the Class Action Fairness Act of 2005, 28 U.S.C.  
13 § 1332(d)(2) ("CAFA"), in response to a concern that, "[o]ver the last decade, there have been  
14 abuses of the class action device that have ... harmed class members with legitimate claims  
15 and defendants that have acted responsibly ... and undermined public respect for our judicial  
16 system." Pub.L. 109-2, § 2(a)(2). Congress recognized that these abuses "undermine the  
17 National judicial system, the free flow of interstate commerce, and the concept of diversity  
18 jurisdiction as intended by the framers of the United States Constitution, in that State and  
19 local courts are keeping cases of national importance out of Federal court; [and] sometimes  
20 acting in ways that demonstrate bias against out-of-state defendants; ..." *Id.*, §2(a)(4).

21 6. CAFA was intended to help correct these abuses by "restor[ing] the intent of  
22 the framers of the United States Constitution by providing for Federal court consideration of  
23 interstate cases of national importance under diversity jurisdiction." Pub.L. 109-2, § 2(b)(2).  
24 Accordingly, under CAFA, district courts "shall have original jurisdiction of any civil action  
25 in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of  
26 interests and costs, and is a class action in which ... any member of a class of plaintiffs is a

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1 citizen of a State different from any defendant ... .” For purposes of determining whether the  
2 amount in controversy requirement is met, “claims of the individual class members shall be  
3 aggregated to determine whether the matter in controversy exceeds the sum or value of  
4 \$5,000,000, exclusive of interests and costs.” 28 U.S.C. § 1332(d)(6).

5 7. Although Defendant denies that Plaintiff will ever be able to satisfy the  
6 standards for class certification, the King County Action satisfies CAFA’s jurisdictional  
7 requirements. To begin, the King County Action satisfies the minimum diversity required by  
8 CAFA. Plaintiff, upon information and belief, is a citizen of Washington. By contrast, Tween  
9 Brands is a citizen of Delaware and Ohio. Accordingly, at least one member of the proposed  
10 class is a citizen of a state different than the Defendant.

11 8. Plaintiff’s Complaint does not allege a total aggregate sum or value for all  
12 claims asserted by Plaintiff on behalf of itself and all putative class members. However,  
13 based on the allegations of the Complaint, including the specific claims asserted by Plaintiff,  
14 Defendant has a good-faith belief that the matter in controversy exceeds the sum or value of  
15 \$5,000,000, and thus satisfies 28 U.S.C. § 1332(d)(2). Defendant’s belief that the matter in  
16 controversy exceeds the sum or value of \$5,000,000 is based on the following:

17 a. Plaintiff’s proposed class presumably covers a class period  
18 commensurate with the statute of limitations for CPA claims (from December, 2008, when the  
19 call alleged in the Complaint took place) and alleges upon information and belief that the  
20 Class exceeds 1,000. *See* Complaint at ¶4.3. The number of Tween Brands customers who  
21 have voluntarily provided their phone numbers to the company exceeds 10,000. Declaration  
22 of Bryan Morrow.

23 b. Plaintiff contends that Defendant’s alleged violations of the CPA  
24 caused Plaintiff and all other similarly situated in the putative class “incidental statutory  
25 damages of \$500 per message” that should be trebled, along with costs of suit and attorneys  
26 fees. Complaint, ¶ 3.16; V.C.

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1 c. Under Washington law, if Plaintiff were to prevail, the CPA permits an  
 2 award of treble damages of up to \$10,000 to Plaintiff, as well as all represented class  
 3 members who suffered actual damages. *See Smith v. Behr Process Corp.*, 113 Wn. App. 306,  
 4 345-46, 54 P.3d 665 (2002).

5 d. While Defendant vehemently denies that it violated the CPA, and  
 6 specifically denies the claims made by plaintiff will satisfy the requirements of Rule 23 or that  
 7 any putative class member is entitled to recover monetary or statutory damages in any  
 8 amount, based on Plaintiff's allegation that "more than one thousand" class members may be  
 9 entitled to damages, trebled "up to \$10,000 per violation," Defendant has a good-faith basis to  
 10 believe that the amount in controversy exceeds CAFA's \$5,000,000 requirement. *See Korn v.*  
 11 *Polo Ralph Lauren Corp.*, 536 F.Supp.2d 1199, 1205 (E.D. Cal. 2008) ("Where a statutory  
 12 maximum is specified, courts may consider the maximum statutory penalty available in  
 13 determining whether the jurisdictional amount in controversy requirement is met.").

### 14 III. NO CAFA EXCEPTIONS APPLY

15 9. Although Defendant denies that it is its burden to show that CAFA's  
 16 exceptions to jurisdiction apply, none do. As discussed above, Plaintiff is a resident of  
 17 Washington but Defendant is not a Washington resident. Plaintiff has not limited class  
 18 membership to Washington residents. Based on the Plaintiff's Complaint, Defendant has a  
 19 good faith belief that the exceptions set forth in 28 U.S.C. § 1332(d)(3) do not apply.

20 10. Next, the "home-state" exceptions set forth in 28 U.S.C. § 1332(d)(4)(A) &  
 21 (B) do not apply. Section 1332(d)(4)(A) applies where two-thirds of the members of the  
 22 proposed class share citizenship with at least one defendant (a) "from whom significant relief  
 23 is sought," (b) "whose alleged conduct forms a significant basis for the claims asserted by the  
 24 plaintiff class," and (c) "who is a citizen of the State in which the action was originally filed."  
 25 28 U.S.C. § 1332(d)(4)(A). Likewise, Section 1332(d)(4)(B) applies where two-thirds of the  
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1 members of the proposed class and all the "primary defendants" are citizens of the forum  
2 state. 28 U.S.C. § 1332(d)(4)(B).

3 **IV. PROCEDURAL REQUIREMENTS**

4 11. This Notice of Removal is timely filed within thirty (30) days from the date on  
5 which the Summons and Complaint was served and removable pursuant to 28 U.S.C.  
6 § 1446(b).

7 12. This Court is the United States District Court for the district and division  
8 within which plaintiff's action, King County Superior Court Cause No. 09-2-11996-1 SEA is  
9 pending. *See* 28 U.S.C. § 1441(a).

10 13. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a). The claims  
11 asserted in the Complaint arose in this district, and defendant does business in this district.

12 Therefore, defendant gives notice that Cause No. 09-2-11996-1 SEA, now pending  
13 against it in the Superior Court of Washington for King County, has been removed therefrom  
14 to this Court.

15 DATED this 10<sup>th</sup> day of April, 2009.

16 LANE POWELL PC

17  
18 By 

19 Grant S. Degginger, WSBA No. 15261

Barbara J. Duffy, WSBA No. 18885

20 Attorneys for Defendant Tween Brands, Inc.

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